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No. 83-1632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

vs.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Does the First Amendment require that the scope of copyright protection for a work of non-fiction be narrowed?

2. Does the First Amendment prevail over Copyright in a fair use case, where the copyrighted material allegedly published in the name of harvesting knowledge was in fact soon to be published by the copyright owner?

3. Should a court, in a fair use case, give weight to the facts that the material taken was from an unpublished manuscript and that the use was non-productive?

THE PARTIES

The parties before this Court are those set forth in the caption.*

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court: Petitioner Harper & Row, Publishers, Inc. states that it has no corporate parent and that other than Fitzhenry & Whiteside Ltd., a Canadian corporation, it has no subsidiaries or affiliates (other than wholly-owned subsidiaries). Petitioner The Reader's Digest Association, Inc. states that it has no corporate parent and no publicly-owned subsidiaries or affiliates.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 723 F.2d 195 (2d Cir. 1983), and are annexed to the Petition for Certiorari as Appendix A. The District Court opinion is reported at 557 F. Supp. 1067 (S.D.N.Y. 1983) and is annexed to the Petition for Certiorari as Appendix B. The District Court's Supplemental Findings of Fact and Conclusions of Law, not reported, are annexed to the Petition for Certiorari as Appendix C.

JURISDICTION

The opinion and order of the Court of Appeals was entered on November 17, 1983. A timely petition for rehearing and rehearing *en banc* was denied on January 4, 1984, and this Petition for Certiorari was filed within 90 days of that date. The order denying rehearing is annexed to the Petition for Certiorari as Appendix D. The Petition for Certiorari was granted on May 29, 1984.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I Sec. 8 of the Constitution provides that:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The First Amendment to the Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 102 of the Copyright Revision Act of 1976, 17 U.S.C. § 102 (1982), provides that:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or

> with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
>
> (2) musical works, including any accompanying words;
>
> (3) dramatic works, including any accompanying music;
>
> (4) pantomimes and choreographic works;
>
> (5) pictorial, graphic, and sculptural works;
>
> (6) motion pictures and other audiovisual works; and
>
> (7) sound recordings.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. § 106 (1982), provides that:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pic-

tures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Section 107 of the Copyright Revision Act of 1976, 17 U.S.C. § 107 (1982), provides that:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

Petitioners Harper & Row, Publishers, Inc. ("Harper & Row") and The Reader's Digest Association, Inc. ("Reader's Digest") are the owners of the publication rights to "A Time to Heal," the memoirs of former President Gerald R. Ford. Shortly before publication of this book, Respondents, Nation Enterprises and

The Nation Associates, Inc. ("the *Nation*") received a copy of the manuscript from a clandestine source. Quickly copying from the unpublished work, and without adding independent commentary, the *Nation* published in their weekly magazine an article entitled "The Ford Memoirs-Behind the Nixon Pardon." The *Nation* had ascertained the memoirs' book publishing schedule, and knew their article would be appearing just two weeks before *Time* was to print licensed excerpts. Petitioners brought suit in Federal district court for copyright infringement under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* and 28 U.S.C. § 1338(a) (1982).

After a bench trial, the District Court held that the *Nation* article quoted and paraphrased Mr. Ford's copyrightable expression, and that the fair use doctrine did not exonerate defendants' copying.

The Court of Appeals for the Second Circuit reversed in a 2-1 decision. The majority opinion (Kaufman, J.) held that most of the material quoted and paraphrased by the *Nation* was not protectible under the copyright laws and that the balance of the copying was permissible under the fair use doctrine.

STATEMENT OF FACTS

The Ford Manuscript

On February 28, 1977 former President Ford entered into a publishing contract with plaintiffs, granting them the exclusive rights to publish and sell his memoirs in book form and to license the right to publish excerpts in newspapers or periodicals prior to book publication. (Findings 6-7, C 5-6)[1]

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[1] The following abbreviations are used:

Ja___ Joint Appendix, at the page indicated.

A___, B___, C___, D___, E___ Appendix __(A, B, C, D, or E) to the Petition for Certiorari, at the page indicated.

President Ford hired an experienced writer, Trevor Armbrister, to assist him in preparing his memoirs, and they worked together on them for approximately two years. Mr. Ford intended the memoirs to be as informal as possible, based upon his own recollections and without reliance on documents. Armbrister felt the memoirs should be very human and reflect the personal side of Ford's public service. (Findings 9-10, C 6-7).

Armbrister participated in over 200 2-hour taped interviews with Ford which were transcribed in 3,600 legal sized pages. Both participants spent considerable time preparing for the interviews, and Ford drafted "word portraits" of major figures and essays on various subjects. (The latter included Ford's perception of Nixon's character copied almost verbatim by the *Nation*). Armbrister also conducted 2,600 legal sized pages of taped interviews with numerous other people, including Alexander Haig, Nelson Rockefeller, Henry Kissinger and President Ford's aides. These were used to check and stimulate Mr. Ford's recollections and reconstruction. (Findings 10-15, C 7-10; Armbrister, TR, R. Vol. 1, A 123, 184-85, 218-19; E 38-39).

Armbrister completed a first draft in February 1979. President Ford reviewed, edited and then revised the initial typescript. Three further, complete word-for-word editing sessions involving President Ford, Armbrister and others occurred, with the former President personally making many changes in each draft. President Ford's March 1979 changes in the galleys were so extensive that one of the editors described it as a "rewriting." (Findings 17-19, C 11-12).

The manuscript, which used the former President's own words from the Ford-Armbrister dialogues, had Mr. Ford's full and

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R. Vol. ___, ___	The indicated volume of the record on appeal before the Court of Appeals, at the page indicated.
Findings	Findings of Fact and Conclusions of Law of The District Court, Reproduced in Appendix C to the Petition for Certiorari.
PTX___	Plaintiffs' trial exhibit ___.
DTX___	Defendants' trial exhibit ___.
TR	Trial transcript.
Dep.	Deposition.

final approval of the selection and arrangement of all of its contents, as well as of the language employed. (Finding 20, C 11-12).

The Author's Agreements with Harper & Row and Reader's Digest

An exhibit to the publishing contract stated that Mr. Ford's memoirs would:

> describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and (3) Mr. Ford's reflections on this period of history, and the morality and personalities involved. (Finding 21, C 14-15).

In the contract Ford also acknowledged that the value of the rights granted would be substantially diminished by his public discussion of the "unique information not previously disclosed" about his career and personal life and that he would "endeavor" not to disseminate any of such information. However, the agreement also provided: "Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision." (Finding 22, C 15-16).

Ford, as President, had testified extensively concerning the pardon before a Sub-Committee of the House Committee on the Judiciary under Representative Hungate. In this case he testified that he had already disclosed publicly while in office all of the facts about the pardon. In addition, after leaving office and while preparing his manuscript, he responded to press and audience questions about the pardon during interviews and

speeches. (Findings 22-23, C 15-16; Ford Dep., JA 491-96, 529-32). There was no evidence that Mr. Ford withheld comment about the facts of his public life after leaving the Presidency.

Ford's publishers also understood that the memoirs' unique information not previously disclosed would relate to Ford's personal thoughts and feelings about the events of his Presidency, rather than the events themselves. (Finding 24, C 17).

The License to Time Magazine

On March 14, 1979 when work on the memoirs was nearing completion, the plaintiffs licensed to *Time* the exclusive right to publish (before book publication) excerpts from Chapters I and III, which *Time*'s editor described as the "most interesting and moving parts of the entire manuscript." The excerpts were to appear in *Time*'s April 23 issue to go on sale at newsstands on April 16, 1979. *Time* paid $12,500 upon signing the license and was to pay another $12,500 upon its publication of the excerpts. *Time* was allowed to renegotiate the second installment in the event there was any publication from Chapters I and III before *Time*'s. (Findings 27-29, C 18-19; Cave Dep., R. Vol. V, E 1048-49).

The Nation Article

In December 1977, a new group of investors acquired the *Nation* magazine with avowed goals of increasing circulation and advertising revenue and turning the magazine around financially. Their plan included efforts "to stay on top of the news on a week-to-week basis" and the appointment of Victor Navasky as Editor. Navasky was a Yale Law School graduate with broad experience in journalism and public affairs. (Navasky Dep., R. Vol. IV, E 836-39, 841, 843-45, 849, 851).

In late March 1979, a person, never identified, secretly gave Navasky a copy of the unpublished manuscript of the memoirs. Navasky knew that his receipt of the manuscript was unauthor-

ized. Over the next 24 hours or weekend, the *Nation* rushed into print for its April 7, 1979 edition, a 2,250 word cover-featured piece "The Ford Memoirs-Behind the Nixon Pardon", derived almost exclusively from the memoirs, 83% (1,870 words) of which was copied or closely paraphrased from the unpublished manuscript. (Findings 33-36, C 20-22; E 1-41).

The extent of the copying has never been disputed. The nature of it can be readily seen by examining Plaintiffs' Exhibit 11, reproduced as Appendix E to the Petition for Certiorari, containing a side-by-side comparison of the *Nation* article and the Ford manuscript. As can be seen from a review of this exhibit, the copying included Ford's personal expression of the events and personalities of his Presidency, and of his feelings about those events and personalities. (E 1-41).

For example, defendants quoted verbatim Ford's reflections on his reasons for pardoning Richard Nixon:

> Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible. (E 26-27).

The *Nation* also directly copied Ford's account of his reactions to seeing Mr. Nixon in the hospital, and his views on Mr. Nixon's character:

> He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen and I thought I had never seen anyone closer to death.
>
> * * *
>
> A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously he didn't feel that the press was weak. Report-

> ers, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)
>
> His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. (E 28-29, 38-39).

Defendants' trial testimony further demonstrated that defendants sought to, and did, copy Ford's expression. Mr. Navasky testified that he quoted Ford's portrait of Nixon because "this was his (Ford's) own way of saying it." (Navasky, TR, JA 305). He quoted Ford's vivid description of Nixon in the Long Beach hospital, because it was a "dramatic statement" and "a very powerful passage.") *Id.* at JA 334, 337). He quoted Ford's evaluation of the reasons for granting the pardon "because of the absolute certainty with which he expressed himself." (*Id.* at JA 303). He quoted Ford's account of the negotiations with Ron Ziegler because ". . . when Ford writes about this as a narrator, it was the definitive quality of that statement that made me put it in." (*Id.* at JA 306). And he quoted Ford's account of Nixon's assurances of innocence because it was "a much more powerful statement for the reader." (*Id.* at JA 300).

The *Nation*'s piece was placed on sale by April 3, 1979 despite defendants' knowledge of plaintiffs' contract with *Time* for publication in *Time*'s issue to be on sale April 16th, and despite the *Nation*'s awareness of the scheduled availability of the full book in bookstores from May 1, 1979. The *Nation* also knew that the published memoirs' commercial success would depend on public reaction to the *Time* excerpts, and were aware that the same portions which defendants copied would be of interest to *Time*. (*Nation* Article, E 6; Navasky, TR, JA 415-16; Findings 34, 67, C 21, 28-29).

At the time of publication, the *Nation* proclaimed its purpose of "scoop(ing) former President Ford on his own memoirs." (PTX 22, R. Vol. IV, E 782). They intended to make a "news event" for the wire services by recounting Ford's story of the pardon as he told it, without independent commentary. (Navasky, TR, JA 300b-300d, 316b-316f, 412-17).

Navasky's notes show that he had initially intended to include a section in his article which would critically explore the issues which he perceived the memoirs raised. (PTX 19, R. Vol. IV, E 770). However, he eschewed this approach, because "It looks like I didn't have time to . . . The story I wrote, which I did very quickly because we wanted to get it out as soon as possible, seemed to work without my going into this other stuff." (Navasky Dep., R. Vol. IV, E 893).

Due to their rush, the *Nation* also failed to check the record or realize that the pardon-related events recounted were well known, and that Ford's story was not based on government documents or information which Ford had sequestered from public view. (Findings 44-46, C 24-27; Navasky, TR, JA 341-48; Armbrister, TR, R. Vol. 1, A 123-24).

Time's Reaction

The appearance of the *Nation*'s piece caused *Time* to cancel its plans to publish excerpts and to refuse payment to plaintiffs of the $12,500 that would otherwise have been due upon *Time*'s publication. (Finding 38, C 22-23).

SUMMARY OF ARGUMENT

The majority opinion by Judge Kaufman raises important issues concerning the relationship between copyright and the First Amendment.

In reversing the District Court, the majority decided two issues: first, that most of the material admittedly copied by the *Nation* was entitled to no protection under the copyright laws, and second, that the unauthorized use of the balance of the material (*i.e.*, the material entitled to protection) was privileged under the doctrine of fair use.

The majority reached these decisions in each instance by concluding that First Amendment interests prevailed over

Copyright interests. In each instance, however, the majority failed to strike the proper balance between these constitutionally protected interests.

I. In concluding that most of the copied material was not entitled to protection under the copyright laws, the majority applied three novel theories of copyrightability. Each conflicts with traditional copyright holdings.

First, the majority held that in works dealing with news or history, "expression" is limited to its barest elements—the ordering and choice of the words themselves. In so holding, the majority excluded from consideration important elements of authorship that courts have traditionally protected: the author's selection and arrangement, his analysis or interpretation of events, the way he structures his material and marshals his facts, and the emphasis he gives to particular developments.

Second, the majority held that facts coupled with expression cannot constitute a copyrightable totality. The majority thereby departed from traditional copyright holdings which (a) have accorded copyright protection to works consisting primarily of factual material, and (b) have rejected a dissection approach in determining copyrightability and required instead that the material be looked at as a whole.

Third, the majority held that in works of nonfiction, paraphrasing constitutes copying only if it is so extensive that the copier has borrowed virtually an entire work. In so holding, the majority disregarded numerous copyright precedents holding just the opposite.

The majority's belief that these restrictions on copyrightability are necessary to advance First Amendment freedoms is without merit. The author would not become the owner of an event by describing it in words. He would only become the owner of his description of the event. That is the very material that the *Nation* copied. The District Court expressly found that the *Nation* was not interested in the facts and memoranda in isolation, but rather that it was the totality of the facts and memoranda collected together with Ford's reflections that made them of value to the *Nation*.

The majority's overly narrow definition of copyrightability will necessarily deprive authors of the protection accorded to them by the copyright laws. It will also deprive the courts of the flexibility of resolving questions of unauthorized use of copyrighted materials under the equitable principles embodied in the fair use doctrine.

II. Similarly, in its fair use analysis the majority failed to strike the proper balance between Copyright interests and First Amendment interests.

On the copyright side, the majority gave no recognition to the policy underlying the monopoly given to the author:

> . . . [T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Sony Corp. v. Universal City Studios, Inc., 104 S.Ct. 774, 782 (1984).

On the free speech side of the balancing, the majority relied upon the policy of facilitating the dissemination of information but failed to recognize that it had no application here, where the material was about to be published by the author, as excerpts in *Time* magazine in about two weeks and in book form two weeks after that.

The majority also disregarded two important copyright principles which, had they been applied in this case, would have led to an affirmance of the District Court's judgment.

First, the majority disregarded the fact that the material copied by the *Nation* came from an unpublished manuscript whose possession was known to be unauthorized. By publishing such material, the *Nation* took upon itself the right of first publication, a right which Congress has given exclusively to the author.

In giving no weight to the fact that the manuscript was unpublished, the majority disregarded the clear statement of congressional intent that only in extraordinary cases should an author's right of first publication be violated by another's use of material from the unpublished manuscript. No showing was made here, or even attempted, of extraordinary circumstances. No showing was made of any benefit derived by the public from the dissemination of this material by the *Nation* in advance of its dissemination by the author.

Second, the majority disregarded the fact that the *Nation* added nothing to the material it published. The *Nation*'s nonproductive use of the material should have been weighed in the fair use analysis, especially since the *Nation* conceded that it considered and rejected a productive use which would have involved virtually no copying of expression from the manuscript.

Thus the majority's conclusion that the *Nation*'s piece was fair use news reporting was based upon its failure to consider the relevant factors: the extensive use of expression; the use of material from an unpublished manuscript whose possession was known to be unauthorized, with no showing of extraordinary circumstances to justify defeating the author's right of first publication; and the non-productive nature of the use.

Given these undisputed facts, plus the District Court's finding that the *Nation*'s use diminished the value of the copyright, the determination by the District Court that there was no fair use should have been affirmed.

ARGUMENT

I

The Majority Erred in Redefining and Severely Limiting the Scope of What Is Protectible Under the Copyright Laws in a Work of Non-Fiction

In three holdings of far-reaching consequence, the majority set down new definitions of what is protectible under the copyright laws in a work of non-fiction. Thus the majority held (a)

that in works concerning news and history, the "troublesome" concept of expression must be limited to "its barest elements—the ordering and choice of the words themselves" (A 19), (b) that facts coupled with expression cannot constitute a copyrightable totality (A 21), and (c) that almost unlimited paraphrasing from a work of non-fiction is permissible, unless the copier has "borrowed virtually an entire work." (A 17).

A. The Majority's Limitations on Copyrightability Conflict with Traditional Copyright Holdings

(1) Limiting Expression to Its Barest Elements

By holding that in the context of news or history, "expression" must be limited to "its barest elements—the ordering and choice of the words themselves" the majority excluded from its consideration important elements of authorship—an author's selection and arrangement of material, his analysis or interpretation of events, the way he structures his material and marshals his facts and the emphasis he gives to particular developments. The majority holding conflicts with traditional copyright holdings.

A leading case is *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), upholding a finding of copyright infringement for publishing abstracts of plaintiffs financial research reports. The defendant in *Wainwright*, like this defendant, relied upon news reporting as its principal defense. The unanimous court there stated:

> It is, of course, axiomatic that "news events" may not be copyrighted. But in considering the copyright protection due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, *i.e.*, the event itself, and "the particular form or collocation of words in which the writer has communicated it." *What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he*

> *gives to particular developments*. Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the "particular expression through similarities of treatment, details, scenes, events, and characterization." In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source.

Id. at 95-96 (citations omitted; emphasis supplied).

This definition of expression has been consistently followed in other circuits. As early as 1921, the Seventh Circuit held the "arrangement and manner of statement" of news and facts to be protected. *Chicago Record-Herald Co. v. Tribune Ass'n.*, 275 F. 797, 799 (7th Cir. 1921). The court there stated: ". . . if the whole of it were considered as stating news or facts, yet the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship, bringing the article clearly within the purview and protection of the Copyright Law." The Seventh Circuit followed this holding in *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957), there defining copyrighted expression in a historical work to include "[t]he association, arrangement and combination of ideas and thought and their form of expression. . ." *Id.* at 603.

In *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981), involving alleged copying from a work of non-fiction concerning a highly publicized kidnapping, the Fifth Circuit upheld instructions to the jury that "the form of expression of the facts and their arrangement and selection are copyrightable"; and that while a general theme cannot be copyrighted, "its expression throughout the pattern of the work, the sequence of its events, the development of the interplay of its characters and its choice of detail and dialogue can be copyrighted." *Id.* at 1368. In *United States v. Hamilton*, 583 F.2d 448, 450 (9th Cir. 1978), the Ninth Circuit accorded protection to a mapmaker's "selection, arrangement, and presentation of terrain features."

Other holdings of the Second Circuit are also consistent with *Wainwright*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). In *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929), the court protected the "association, presentation and combination of the ideas and thought" which went to make up plaintiff's lectures on memory improvement; and in *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962), the court protected plaintiff's "analysis, organization of material, phrasing and citations" in a book on real estate condemnation proceedings.

District courts have also followed a broader definition of "expression" than that applied by the majority. Thus in *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 923 (S.D. Cal. 1963), the court applied the "association, arrangement and combination of ideas and thoughts" definition to determine what was copyrightable in the plaintiff's biography of a historical figure. And in *Amana Refrigeration, Inc. v. Consumers Union of the United States, Inc.*, 431 F. Supp. 324, 326 (N.D. Iowa 1977), the court rejected an argument that a Consumer's Union report on a particular product was not copyrightable because it was merely a "bald statement of fact without originality," finding instead that the paragraph which had been copied from the report was "more than mere statement of fact. It contains defendant's original analysis and conclusion and is copyrightable."[2]

A narrow definition of expression is particularly inappropriate in the case of autobiography. Autobiography is more expressive than other works of history because, by its nature, autobiography gives the author's unique perspective of the events depicted. Lower courts have cited the importance of this distinction in copyright cases. *See Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) and *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1275-76 (S.D.N.Y. 1970). In both cases the court distinguished

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[2] Nimmer also rejects a narrow definition of expression. 1 M. Nimmer, *Nimmer on Copyright*, § 2.11[D], "Protection for the Selection and Arrangement of Facts" at 2-164-65 (1984).

between the use of prior copyrighted statements concerning the subject of the biography and use of the independent intellectual creation of that person.

The expressive nature of autobiography is directly relevant to this case, because it was Ford's unique perspective which the *Nation* copied. In a finding that is not challenged, the District Court stated that:

> . . . [the] facts and memoranda were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. (B 10).

Thus the *Nation* is incorrect in its contention that the majority's narrow definition of expression merely represents an application of long-established law. (Br. in Opp. 5-7). Judge Kaufman's prior opinion in *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), in no way supports this contention; *Hoehling* simply held that protection was limited to expression; it did not seek to define expression. Even if *Hoehling* did support the majority's narrow definition, that would not negate the conflict between that definition of expression and the traditional definition set forth above.

(2) Denying Copyrightability to Facts Coupled with Expression

The ruling that fact coupled with expression cannot constitute a copyrightable totality (A 21) conflicts with traditional copyright holdings on two counts.

First, the unauthorized copying of works consisting primarily of factual material has been held to be an infringement by a number of circuits. Thus, copyright protection has been accorded to "the arrangement, expression and manner of presentation" of mathematical data and formulae concerning hydraulic cylinders, *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); to the selection, ordering and arrangement of the names and addresses of suppliers of gardening materials, *Schroeder v. William Mor-*

row & Co., 566 F.2d 3 (7th Cir. 1977); to a telephone directory, *Leon v. Pacific Telephone and Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937); and to the selection and arrangement of cases under particular sections of the Ohio code, *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928).

Recently, a different panel of the Second Circuit found that plaintiff's compilation of baseball cards had been infringed by defendant's compilation. The court expressly rejected the defendant's contention that "selection and arrangement of information does not merit protection." *Eckes v. Card Prices Update*, No. 83-7920, slip op. at 4274 (2d Cir. June 8, 1984).[3]

In the above cases, the courts have accorded copyright protection because of the authorship involved in creating the compilation. Surely, the authorship in a presidential memoir, or any other work of history, is entitled to as much protection as the authorship in a compilation of baseball cards.

The majority's rejection of the totality concept is also in direct conflict with cases in the Ninth and Fifth Circuits. In *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), the Ninth Circuit held that although the textual material in a greeting card was in the public domain, this did not end the inquiry into the copyrightability of the entire card. Rather the court held the "proper analysis" of the issue required that "all elements of each card, including text, arrangement of text, art

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[3] An alternative approach to determining copyrightability in factual works is proposed in Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516 (1981). The suggested approach is to "find authorship in the act of aggregating isolated pieces of information. The particular *collection* of data would thus itself be a work of authorship." (*Id.* at 530; emphasis in original). The author argues that this rule should apply to nonfiction narratives as well as other factual compilations. (*Id.* at 538) and that such a rule "would compel a defendant who has made a substantial appropriation of facts to rely directly upon the fair use defense, thus providing an opportunity for a detailed analysis of the nature and effect of the defendant's appropriation." (*Ibid.*) The Denicola approach would provide an independent ground to support a finding of copyrightability in this case. However, because the material copied in this case was copyrightable under the traditional standards applied by the District Court, it is not necessary to determine the validity of this alternative approach.

work and association between art work and text, be considered as a whole." *Id.* at 1109.

In *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978), the Ninth Circuit adhered to the doctrine of *Roth*. There the court rejected the defendant's argument that the map which it had copied was not entitled to copyright because it was merely a synthesis of information already depicted on maps in the public domain, finding instead that "[w]hen a work displays a significant element of compilation, that element is protectible even though the individual components of the work may not be, for originality may be found in taking the commonplace and making it into a new combination or arrangement." *Id.* at 451.

And in *Sid & Marty Krofft Television Productions, Inc. v. MacDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), the Ninth Circuit also rejected the defendant's "invitation to dissect the works," holding that ". . . it is the *combination* of many different elements which may command copyright protection because of its particular subjective quality." *Id.* at 1169.

Recently, the Fifth Circuit criticized a trial court for dissecting plantiff's work and dividing it into components in determining copyrightability. *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984). The court stated, "The mere fact that component parts of a collector's work are neither original to the plaintiff nor copyrightable by the plaintiff does not preclude a determination that the combination of such component parts as a separate entity is both original and copyrightable." *Id.* at 388.

A prior decision of the Second Circuit has also endorsed the "totality" concept which the majority below rejected. In *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922), the court found that the defendant had infringed the plaintiff's copyright to its compilation of trademarks, stating "if a man compiles a book containing such information [name, occupation, place of business, residency] about the residents of a particular place, *he may . . . copyright it as a whole*, notwithstanding the fact that the separate parts of which it is composed are not copyrightable." *Id.* at 87 (emphasis supplied).

The artificiality of the *Nation's* dissection approach to copyrightability is graphically illustrated by the *Nation's* own analysis of copyrightability (Addendum A to the *Nation's* post-trial memorandum, included by the *Nation* in the Joint Appendix at JA 557). Addendum A is aptly titled a "sentence-by-sentence analysis" of the *Nation* article. It proceeds from the premise that if some reason can be found for denying copyrightability to a particular sentence, that sentence is excluded from any future copyright consideration. Obviously such an approach makes it impossible to consider whether the sentence in question, in combination with other sentences, is entitled to protection because of the selection, arrangement or emphasis of the material as a whole.

The District Court correctly rejected this artificial approach. Thus, for example, under the District Court approach, even though plaintiffs were not claiming copyright in the Ruth memorandum, that would not preclude President Ford from obtaining protection for his description of various factors influencing his decision to grant the pardon, including the advice received from Ruth. (E 16-17). The District Court, evaluating all the evidence, correctly found that the "historical facts, memoranda, and statements [were] integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." (B 11). This finding is not challenged.

(3) Allowing Virtually Unlimited Paraphrasing From a Work of Non-Fiction

Finally, the holding that paraphrasing from a work of nonfiction constitutes infringement only if the copier "borrowed virtually an entire work" (A 17) is in conflict with traditional copyright holdings in several circuits. In *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966), the Seventh Circuit found infringement where defendant had paraphrased two pages of a 32-page booklet containing mathematical data and formulae. In *Wagner*

v. Meccano Ltd., 246 F.603 (6th Cir. 1917), *aff'g* 234 F. 912 (S.D. Ohio 1916), the Sixth Circuit upheld a finding of infringement based upon paraphrasing of some of the statements and descriptions in an instruction manual for mechanical toys. In *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82, 87 (6th Cir. 1928), the Sixth Circuit found infringement after reviewing 54 instances of "paraphrasing or identities of expression" taken from the plaintiff's 11 volume work.[4]

District courts have also held that paraphrasing of less than an entire non-fiction work or an entire chapter of a non-fiction work constitutes infringement. For example, in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), the court held that the defendant's paraphrasing of three sentences from the plaintiff's scientific book on the human voice constituted infringement because ". . . it is not necessary that the whole or even a large portion of the book shall have been copied. It is sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole." *Id.* at 303.

B. The Majority's Limitations on Copyrightability Are Not Needed to Advance First Amendment Freedoms and Would Undermine Important Copyright Policies

Underlying the majority's three holdings limiting copyrightability was its perceived need to "construe the concept of copyrightability in accord with First Amendment freedoms." (A 19). The majority feared that unless it limited the scope of copyright protection in the manner outlined above, an "individual could

[4] In attempting to distinguish these cases, the *Nation* simply mis states their findings. The courts in *Flick-Reedy* and *Wagner*, did not find that the defendants had copied the entirety of the plaintiffs' works, as the *Nation* asserts (Br. in Opp. 8). They found exactly the opposite, that the entire work had not been copied. *Flick-Reedy*, 351 F.2d at 549 and *Wagner*, 234 F. at 922. Nor did the court in *W. H. Anderson Co.* rest its decison solely on a finding that the defendant had used the plaintiff's entire work (Br. in Opp. 8-9) but rather concluded that the defendant's outright copying and paraphrasing in the 54 instances specifically alleged by the plaintiff was sufficient to conclude the question of substantial infringement in the plaintiff's favor. 27 F.2d at 88.

be the owner of an important political event merely by being the first to depict that event in words" (A 19) and a public official could "take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting that the work's entire contents are thereby made his alone by virtue of copyright." (A 21).

Such fears are wholly unfounded. The individual would not become the "owner" of the event by being the first to depict it in words. He would become only the owner of his own description of the event. And even that ownership is subject to the limitation of the doctrine of fair use. Therefore, in determining whether a particular use is fair, a court applying this doctrine will consider all competing policy interests, including First Amendment interests.

The majority's rationale for limiting the scope of copyright protection also has no application to the facts of this case. Petitioners were not seeking protection for facts and memoranda in isolation, and in findings that are unchallenged, the District Court expressly found that these facts and memoranda:

> . . . were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to The Nation. (B 10-11).

The majority's artificial definition of expression will deny an author protection for important elements of authorship. As the dissent observed, traditional copyright cases provide protection for ". . . the author's original articulation and presentation of the facts. Copyright laws protect originality. They are meant to safeguard the embodiment in a tangible medium of an author's intellectual labors. . . . They thus offer protection against a work that is substantially an unoriginal appropriation of the

copyrighted work." (A 41-42). The majority approach, by depriving an author of this protection, necessarily undermines an important purpose of the copyright laws.

Equally important, the majority approach limits a court's flexibility in dealing with unauthorized uses of copyrighted material. The greatly increased use of copyrighted material permitted by the majority's holdings will not be subject to any of the factors traditionally considered by a court applying the fair use doctrine. The majority has, in effect, transformed a fair use question into an issue of copyrightability. There is a vast difference between sanctioning a use of material because the use is fair, and sanctioning such a use because the material is entitled to *no* protection at all. Under the fair use approach, a court will consider all factors relevant to the "equitable rule of reason" which the fair use doctrine embodies. The majority's approach, in contrast, precludes any weighing of these equitable considerations. A court following the majority approach must therefore sanction the use even if society derives no benefit from it, and indeed even if the use is harmful to important policies underlying the Copyright Act. As we shall demonstrate in Point II, that is precisely what happened in this case.

C. The District Court's Findings that the Material Was Copyrightable Should Be Affirmed

In view of the foregoing, the standards applied by the District Court in determining copyrightability were correct. Since no challenge is made to the factual determination in applying these standards, the factual determination should be upheld.

The District Court was also correct in concluding that it was not necessary to decide whether statements attributed to others are copyrightable. The court stated:

> This principle [that the copyright laws protect the totality of the facts and memoranda collected together with Ford's reflections] governs the portions of Ford's memoirs reciting the statements of individuals other

> than Ford as well. I decline to enter the thicket of deciding which statements were exact quotations—and therefore not protected by copyright—and which were merely reconstructions of statements pieced together by Ford—and therefore copyrightable. I suspect that most were to some degree reconstructions. Suffice it to say that, simply viewed, I regard the historical facts, memoranda, and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence. (Citations omitted) (B 11).[5]

For similar reasons, it is unnecessary to decide whether President Ford's Hungate testimony on the Nixon pardon is in the public domain. The version told in the manuscript is clearly a different version, incorporating, among other things, material concerning the advice given to Ford by his aides between his first and second conversations with Haig.[6] The new version is

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[5] Nimmer agrees with the District Court that reconstructions of statements attributed to others are copyrightable and that the statements attributed to others in this case must have been reconstructions; he criticizes the contrary conclusions reached by the majority. Referring to the *Harper & Row* case, Nimmer states: ". . . there was a factual dispute between the parties as to whether quotations of others contained in President Ford's memoirs were literal (and hence unprotectible by Ford and his assigns), or reconstructed by Ford, and, therefore, protected "expression" under his copyright. The Court of Appeals apparently assumed that the quotations were literal, although in most instances it would seem that recollections of statements made by others in the past must of necessity involve reconstruction rather than literal repetition." 1 M. Nimmer, *Nimmer on Copyright*, § 2.11[B] at 2–161, n.11 (1984).

[6] Other material incorporated in the manuscript version, and not in the Hungate testimony, includes: the characterization that the new tapes contained the "smoking gun"; the deep hurt which Ford felt on learning the new disclosures; Nixon's repeated assurances of innocence, which Ford had believed; Ford's initial response to Haig that it would be improper for Ford to make any recommendations; and the fact that Ford's statement to Haig was written out. (The relevant portions of the Ford manuscript and the *Nation* article are set forth at E 6 through E 15. The relevant portions of Ford's Hungate testimony are contained in PTX 15, R. Vol. IV, E 699-702).

therefore entitled to protection.[7] Having urged throughout the trial that the new version had a different emphasis (Navasky, TR, JA 348-50, 375-83, 452-53), and having stressed that the "main thing" in the new version was "the configuration of information, rather than this or that" (Navasky Dep., R. Vol. IV, E 924-25), the *Nation* is in no position to argue that such version lacks originality.[8]

II

The Majority Erred in its Fair Use Analysis

A. The Majority Did Not Strike the Proper Balance Between the Constitutionally Based Policy of Encouraging Authorship and the First Amendment

The majority saw this case as requiring it to find the proper balance between "the author's monopoly of his original writings" on the one hand and "the citizenry's need to be informed" on the other. (A 24).

Both policies are important and, indeed, constitutionally based. Finding the right accommodation is an important function of the fair use doctrine. The majority, however, did not strike the proper balance.

On the copyright side, the majority referred frequently to the "monopoly" of the author, but nowhere acknowledged that underlying the monopoly is an important public policy. As this

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[7] *Best Medium Publishing Co., Inc. v. The National Insider, Inc.*, 385 F.2d 384 (7th Cir. 1967), *cert. denied*, 390 U.S. 955, *rehearing denied*, 390 U.S. 1008 (1968). *See also* § 101 of the Copyright Act which defines a derivative work to include a work "consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship." 17 U.S.C. § 101 (1982).

[8] The majority stated that "[a]dditional reasons preclude a finding that much of this material is copyrightable," citing Ford's Hungate testimony, and the statements attributed to others. (A 22-23). For the reasons set forth in the text, it is not necessary to reach these issues.

Court recently observed in *Sony Corp. v. Universal City Studios, Inc.*, 104 S.Ct. 774, 782 (1984):

> . . . the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Moreover, the majority downplayed authorship, as we have demonstrated in Point I, by defining what is protectible in such a way as to eliminate important elements of authorship. The majority thereby gave no consideration to the elements of authorship considered by the dissent: "method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original." (A 42).

Finally, by reason of its arbitrary definition of authorship, the majority saw the case as involving only a "very limited use of copyrighted words" (A 29) and the taking of a "meager, indeed an infinitesimal amount of Ford's original language." (A 30). Had the majority applied the correct standard, it would have faced a case involving extensive taking of expression.

On the free speech side of the balancing, the majority's analysis was equally defective. In the majority's view, application of the copyright laws to this use would "impede that harvest of knowledge so necessary to a democratic state." (A 4).

As publishers, we would be the first to recognize the importance of that policy, but it has nothing to do with this case. For there was nothing that the *Nation* did here that facilitated the harvesting of knowledge. The material was about to be published, as excerpts in *Time* magazine in about two weeks, and in full in book form about two weeks after that. The knowledge was going to be harvested in any event, by reason of authorized publications planned by the author and his publishers.

The majority nowhere acknowledges this. Nor does the majority make any attempt to demonstrate that society derived some benefit from publication in the *Nation* two weeks in ad-

vance of publication in *Time*, or four weeks in advance of publication in book form.

Rather than facilitating the harvest of knowledge, the *Nation* simply took upon itself the right to be the first publisher of President Ford's expression, a right expressly conferred on President Ford by the copyright laws and licensed for value to the plaintiffs. 17 U.S.C. § 106(3). The editor of the *Nation* aptly characterized his own article when he said that he had "scoop(ed) former President Ford on his own memoirs." (PTX 22, R. Vol. IV, E 782). It is that which the majority has sanctioned, not the harvest of knowledge.

The precedent set by this case will adversely affect both the incentives to authorship and the dissemination of information.

Under the majority holding it is clear that one may, with impunity, "steal" a manuscript and publish its contents, at least if one takes care to paraphrase less than the entire work. If the manuscript is returned, no offense has been committed. In the majority's view "[m]erely removing" the manuscript under those circumstances constitutes "far too insubstantial an interference with property rights to demonstrate conversion." (A 12-13). Nor is there any liability for trespass to chattels, for that requires "a showing of actual damage to the property interfered with." (A 13, n.5).

The sanctioning of such conduct will not only require a publisher to turn his publishing house into an armed camp. It will also impair his ability to license the publication of excerpts in advance of book publication. Aware of the import of the holding, publishers will know that if they circulate a manuscript to ascertain third party interest in acquiring such rights, there is a real risk that someone will take for free that which is being offered for sale.

This impediment to the exploitation of rights will lessen the incentive for authorship and adversely affect the dissemination of knowledge. Publication of excerpts in advance of book publication serves an important public purpose of disseminating knowledge of the contents of the book to the readers of the

magazine, frequently an audience far larger than the readers of the book. To the extent that publishers are deterred by the majority holding from licensing pre-publication excerpts, that important public purpose will not be served.[9]

Indeed, this case illustrates such an adverse impact. Since *Time* cancelled its publication, the net result of the *Nation's* publication was that excerpts from the manuscript were disseminated to the public not in *Time* magazine, but in the *Nation*, a magazine that obviously reaches a far smaller audience. It is ironic that this result was approved in the name of harvesting knowledge.

The dissenting judge, whose view of the case was not distorted by the errors discussed above, concluded that the only freedom the majority has advanced here was the freedom to "chisel[] for personal profit." (A 48). The sanctioning of such conduct will surely have an adverse impact on authors and publishers.

B. The Majority, Disregarding Congressional Intent, Gave No Weight to the Fact That the Manuscript Was Unpublished

The majority erred in rejecting the fact that the manuscript was unpublished as a factor to be considered in determining fair use.

The District Court had correctly concluded that "[t]he fair use defense is narrowed when the work is unpublished." (C 32).

This holding was consistent with the legislative history of the 1976 Copyright Act, 17 U.S.C. § 101 *et seq*. In that Act, Congress recognized for the first time a separate statutory right of

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[9] *The New York Times* on March 16, 1984 reported that "[t]o insure against leaks" Random House had decided not to offer Governor Cuomo's new book to book clubs or magazines. Governor Cuomo's agent described the book as "one of the most thoughtful pieces of writing ever committed by a political figure" and the author as a "highly articulate, deeply introspective man writing about public life in a way that's enormously revealing without being invidious." *The New York Times*, at C22, col. 2.

first publication. (17 U.S.C. § 106(3), H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976)).[10] In the legislative history Congress made clear its intent that the distinction between published and unpublished works was a factor to be weighed in the fair use analysis. The Senate report states:

> The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's right of first publication would outweigh any needs of reproduction for classroom purposes.

S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975).

The holding by the District Court limiting the applicability of the fair use defense in the case of an unpublished manuscript is also consistent with copyright precedents prior to the adoption of the 1976 Copyright Act. Before the 1976 Copyright Act became effective, unpublished works were protected by common law copyright. At common law, the author clearly had "the exclusive right to the first publication" of his work. *Atlas Mfg. Co. v. Street & Smith*, 204 F.398, 402 (8th Cir.), *appeal dismissed*, 231 U.S. 348 (1913). It was acknowledged that, in the case of an unpublished work, "any use that others made of it might be unfair." *Fendler v. Morosco*, 253 N.Y. 281, 291, 171 N.E. 56, *reh'g denied*, 254 N.Y. 563, 173 N.E. 867 (1930). *See generally* A. Latman, *Fair Use of Copyrighted Works*, Study No. 14 in *Copyright Law Revision, Studies Prepared for the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. (1960), (*reprinted* in 2 Arthur Fisher Mem. ed. 781, 785 (1963); 2 M. Nimmer, *Nimmer on Copyright*, § 8.23 at 8-273 (1984).

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[10] The Report of the House Committee on the Judiciary states that "Clause (3) of section 106 establishes the exclusive right of publication. . . . Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976).

The *Nation* cites Nimmer to support the majority's rejection of this factor (Br. in Opp. 12-13). The most recent update of Nimmer's treatise, however, undercuts the majority's position. Nimmer states, ". . . the scope of the fair use doctrine is considerably narrower with respect to unpublished works which are held confidential by their copyright owners." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-73 (1984).

Both logic and policy support the distinction between a published and unpublished manuscript in fair use cases.

First, an author who has published a work may be deemed to have consented to its "fair use" by others. Obviously, no such consent may be said to apply to unpublished material. Indeed, until the manuscript is published, one cannot say with certainty that the words in the manuscript are the words that the author chooses to publish. In this case, for example, the *Nation* copied an unpublished typescript which was still subject to revision. Extensive changes were made in the galleys before the book was published. (Findings 19, 33, C 11-12, 20-21). The *Nation* had no way to know that there would be no significant changes in the material which it copied. The *Nation* therefore published President Ford's words without giving him an opportunity to complete them himself.

A second and more important reason is that a person who uses expression from an unpublished manuscript is taking it upon himself to be the first publisher of the author's expression. That, however, is one of the author's exclusive rights under the Copyright Act. (17 U.S.C. § 106(3); n. 10, *supra*, p. 30).

The legislative history cited above makes clear the intent of Congress that an author's right of first publication should be defeated only in extraordinary circumstances. A user of material from an unpublished manuscript who invokes the fair use defense should therefore demonstrate that the public will derive some benefit from his dissemination of the material in advance of its dissemination by the author which outweighs the author's right of first publication. The mere fact that the material may be of interest to his readers does not provide such a justification, at

least if the manuscript is soon to be published. In such a case the benefit shown should relate to the availability of the material in the time period prior to authorized publication (in this case 2-4 weeks).

No showing was made in this case that the publication of the material ahead of its publication by the author conferred any benefit on the public. Indeed with respect to the vast majority of the article—everything that was copied except the material relating to the Ford-Haig discussions before Ford became President—the *Nation* made no claim that its early dissemination benefited the public. The magnitude of this material can be seen by examining the article itself. Of the 38 paragraphs in the article, 32 copied expression from the manuscript. Of these at most 7 relate to the Ford-Haig discussions before Ford became President. (E 6 through E 14, first full paragraph). The remaining 25 relate to other matters: the factors considered by President Ford in granting the pardon, and the steps taken and difficulties encountered in carrying out the decision; President Ford's decision to visit former President Nixon in the hospital and his vivid description of that visit; President Ford's personal assessment of Nixon's character, and his account of his reactions on hearing Nixon's resignation speech; President Ford's decision to seek reelection; the impact that a White House photographer had on President Ford's decisions involving the *Mayaguez;* as well as other matters. (E 4; E 14, second full paragraph, through E 40). Thus the *Nation* never claimed that the public derived any benefit from the dissemination, ahead of the author, of 25 paragraphs in its article which copied expression from the manuscript.

Nor was any adequate showing made for the dissemination, ahead of authorized publication, of the seven paragraphs covering the Haig-Ford discussions prior to Ford becoming President. Mr. Navasky testified that he wanted to isolate these discussions and remove the "veneer of innocence" they had in the book, so that editorial writers and the public would read the manuscript through the screen of the questions he was implicitly raising. (Navasky, TR, JA 283, 305-17, 418-20).

This testimony would not constitute a showing of extraordinary circumstances, even if accepted.[11] Mr. Navasky testified that he could have written a persuasive piece after the book was published, but the circulation of that piece would have been limited to the "sub-set" of the readers of his magazine. (Navasky, TR, JA 295-96, 316f-316g, 412-13, 416-18). His reason for publishing in advance of book publication was that it was an opportunity for him to "make news", as opposed to "reporting news" and thereby get additional coverage for his article. (*Id.*). After the book was published, there would be no news value in the story. (Navasky Dep., R. Vol. IV, E 881-82).

But this testimony simply means that the *Nation* has exploited for its own sake the right of first publication. In still another finding that is unchallenged, the District Court stated:

> Mr. Navasky's expressed desire to beat out the competition (TR. 466-67) and to "make news" (TR. 467-68) and create a "news event" (TR. 536) so as to get additional coverage for his magazine through the wire services (TR. 452-53; 456) refers to benefits Mr. Navasky was seeking for the *Nation* and not to any necessity for publication of excerpts in advance of publication authorized by the copyright owner. (C 27-28).

In any event, the *Nation* did not limit its copying to 7 paragraphs. It went on to include in its article an additional 25 paragraphs copying expression from the unpublished manuscript. Since it used far more than necessary to satisfy its purported need to publish ahead of the author, the defense of fair use cannot prevail.[12]

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[11] The explanation is strained, especially when Mr. Navasky denied that without his article, columnists, newspapers and reporters would not have focused on the possibility of the impropriety. (Navasky, TR, JA 432, 549).

[12] The use of material in excess of that needed to satisfy a legitimate purpose has been cited in decisions rejecting a fair use defense. For example in parody cases, the courts have limited use to no more than necessary to recall or conjure up the original work. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). When the user takes more than is necessary for that purpose, fair use has been rejected, *Walt Disney Produc-*

The District Court correctly concluded that:

> The *Nation* article appropriated copyrightable expression far in excess of what was necessary to satisfy any conceivable legitimate news reporting purpose. (C 32).

C. The Majority, in Conflict With This Court's Decision in *Sony*, Gave No Weight to the Fact That the Use Was Non-Productive

The entire Court, in *Sony Corp. v. Universal City Studios, Inc.*, 104 S.Ct. 774 (1984) believed that whether or not a use is productive is an important factor in determining fair use. Indeed, the four dissenters believed that factor was controlling. After setting forth examples of fair use, the dissent stated:

> Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits works to be used for "socially laudable purposes." . . . I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use. (emphasis in original; citations omitted).

104 S.Ct at 807-08.

The majority in *Sony* disagreed only on whether the factor was determinative:

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tions v. The Air Pirates, 581 F.2d 751 (9th Cir. 1978). And in *Folsom v. Marsh*, 9. F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) involving unauthorized copying of copyrighted writings of President Washington, Justice Story relied upon the use of material in excess of that necessary for the purposes of criticism to reject a fair use defense. Justice Story reasoned that a reviewer may quote "if his design be really and truly to use the passages for the purpose of fair and reasonable criticism," but "if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitutes the review for it, such a use will be deemed in law a piracy." 9 F. Cas. at 344-45.

> Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative.

Id. at 795, n.40.

In its Brief in Opposition to the Petition for Certiorari, the *Nation* does not challenge that this factor is relevant to fair use analysis. Rather the *Nation* argues that its use must have been productive because it was "news reporting." (Br. in Opp. 10).

The *Nation's* contention, however, is a non sequitur. As noted from the quotation above, a productive use is one which results "in some added benefit to the public beyond that produced by the first author's work." Whether or not a particular use is claimed or assumed to be news reporting does not answer the question of whether the use results in some added benefit to the public.

The Second Circuit's decision in *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) confirms that the lack of any added benefit to the public is a factor to consider in the fair use analysis, even where the defendant is urging news reporting as a defense. The court there stated:

> Unlike traditional news coverage, moreover, the Transcript did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysts; and it did not include any criticism, praise, or other reactions by industry officials or investors. Rather, the Transcript appropriated almost verbatim the most creative and original aspects of the reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor.

Id. at 96.

The *Nation*'s argument that its use must have been productive because it was news reporting is also contradicted by the facts in the case.

The District Court found that:

> The article was derived almost exclusively from the memoirs. The only contributions by Mr. Navasky were the inclusion of some information concerning the publication schedule of the book and of the *Time* excerpts, a few transition sentences, and three concluding paragraphs in which Mr. Navasky stated that the May 5, 1979 issue of the *Nation* would deal with the "ethical problems" raised by his publication. At his deposition, Mr. Navasky aptly characterized his contribution as "invisible." (PTX 33, Navasky Dep. at 125)

(Finding 36, C 22).

These findings are not challenged. Indeed the correctness of the findings was accepted by both the dissent and the majority in the Court of Appeals. As the dissent observed, the *Nation* article was of "trivial originality and contained no independent research by the author." (A 42).

The majority openly acknowledged that it gave no weight to the fact that the use was non-productive, criticizing the dissent's requirement that "legitimate news add original commentary or contain original research." (A 26). The majority stated that such a requirement ". . . sounds distinctly like an assertion that 'fair use' turns on the amount of the user's labor. The Second Circuit has rejected that approach." (A 26-27).[13]

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[13] The Second Circuit *has* previously held that a second author may make use of a prior author's research. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Until the majority's decision below, however, this principle had not been extended to permit the second author to add nothing at all to the prior author's material, and still call it a fair use.

Unless labels are to prevail over substance, as found by the lower courts, the non-productive nature of the use should have been considered in weighing the fair use defense.[14]

In the facts of this case, moreover, the factor was entitled to added weight, because Mr. Navasky conceded that he considered, and rejected, a possible productive use which would have used only a small fraction of the expression actually used. The article which he rejected would have been an overt editorializing story in which he made the charge that there was an obstruction of justice in the conversations between Ford and Haig before Ford became President and called for an investigation. (Navasky, TR, JA 295-96, 316a-316b, 430). As noted in Point II B. at page 32, these conversations were covered in seven paragraphs in the article, at most. (E 6 through E 14, first full paragraph). In the editorializing story, the content of these paragraphs would have been contained in a footnote, and the balance of the material—comprising 25 paragraphs—would not have been included. (Navasky, TR, JA 316a-316c; E 4; E 14, second full paragraph through E 40).

A person invoking the fair use defense should use no more expression than is necessary to satisfy a legitimate need.[15] Since the editor conceded he could have written an article containing virtually no copying of expression, he should not be permitted to claim a fair use defense for an article containing extensive

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[14] Nimmer's alternative argument—that the *Nation*'s use was productive because it was an abridgment—does not withstand analysis. Nimmer states: "An abridgment may constitute a derivative work (*see* § 3.03 *supra*), and hence a productive use. On this basis, the majority in the *Nation* case was correct in rejecting Judge Meskill's dissenting view that the defendant could not invoke fair use because it had not added original commentary or original research." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A][1] at 13-68, n.23.6a. The *Nation* article may well be an abridgment, and an abridgment is one of the examples of a derivative work specified in section 101 of the Act, 17 U.S.C. § 101 (1982). However, under section 106(3) of the Copyright Act, the owner of the copyright is given the exclusive right to prepare derivative works. Therefore an unauthorized abridgment, without more, should not be considered a productive use for fair use purposes.

[15] *See* n. 12, *supra*, p. 33.

copying of expression, especially when the latter use was non-productive.

The reasons offered by Mr. Navasky for rejecting the productive use do not help his case. He offered two. "One was I wasn't sure which of what I saw in the manuscript was new evidence at that point." (Navasky, TR, JA 296). Surely a user's awareness that he has not done the necessary research to write a productive piece provides no excuse for rejecting such an approach. As Nimmer has stated in criticizing the Court of Appeals' decision in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967): "Insofar as they [the defendants] chose to avoid the expenditure of time and skill necessary to evolve their own expressions and instead copied the plaintiff's expression, there can be no First Amendment justification for such copying." M. Nimmer, *Nimmer on Freedom of Speech*, § 2.05[C] at 2-81 (1984). The principle has particular relevance here where one of the *Nation*'s own experts testified that digging into the known record and comparing the material with the known record were important jobs of a journalist. (Friendly, TR, JA 82, 119-20).

Mr. Navasky also testified that the best chance of having the material "taken as fact" was outside the context of express commentary or criticism. (Navasky, TR, JA 297). Since the book was soon to be published, this excuse carries little weight. Moreover, it would excuse at most the seven paragraphs covering the Ford-Haig discussions, and would not justify the extensive additional copying that took place here.

D. The Errors by the Majority Prejudiced Its Analysis of the News Reporting Defense

The *Nation*'s principal defense in this case is that its use was a kind of "news reporting" and that this automatically establishes a fair use defense. Of course, "news reporting," even if found to exist, is not the equivalent of a fair use defense. The statutory language of section 107 of the 1976 Copyright Act, 17 U.S.C. §§ 101 *et seq*. makes this clear. After citing "news reporting" as one of the permissible fair use purposes, the section goes on to

provide that in "determining whether the use made of a work *in any particular case* is fair" certain enumerated factors are to be considered. Moreover the legislative history indicates that even the factors enumerated are not exclusive. H.R. Rep. 94-1476, 94th Cong., 2d Sess. 65-66 (1976). As this Court stated in *Sony*, 104 S.Ct. 774, 792 (1984), the fair use doctrine is an equitable rule of reason.

The undisputed facts that the majority disregarded, as a result of the erroneous standards discussed above in this brief, compel the conclusion that the *Nation* article was not "news reporting" within the meaning of the section, and that in any event fair use would not apply.

The majority's overly narrow definition of what is copyrightable precluded it from giving adequate consideration to the extent of expression used. Lower courts have, correctly, considered this factor in evaluating a news reporting defense.

Thus in *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), the court stated:

> . . . the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of expression used by the news source.
>
> Here the appellants did not bother to distinguish between the events contained in the reports and the manner of expression used by the Wainwright analysts.[16]

[16] The *Wainwright* court, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), contrasted one-time use by the Wall Street Journal with repeated use by the Transcript. This distinction, however, does not help the *Nation*, because the court relied upon the contrast to emphasize that the Transcript's use of the Wainwright reports was ". . . blatantly self-serving, with the obvious intent, if not the effect, of fulfilling the demand for the original work." (*Id.* at 96). Here the District Court found that the *Nation's* "one-time" use was self-serving and diminished the value of the copyright. (B 8; Findings 38, 54, 57, 66, 67, C 22-23, 27-29).

And in *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980), the court also rejected a news reporting defense stating:

> . . . ABC possessed an unfettered right to use any factual information revealed in *Champion* for the purpose of enlightening its audience . . . , but it can claim no need to "bodily appropriate" Iowa's expression of that information by utilizing portions of the actual film.

See also Roy Export Co. v. Columbia Broadcasting System, Inc., 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982) (rejecting CBS' claim that the First Amendment right to report newsworthy events shielded it from liability for the unauthorized showing of a copyrighted Chaplin film).

The majority's erroneous belief that facilitating the dissemination of information was an overriding factor in this case led it to overlook the fact that what the *Nation* really did here was to "scoop former President Ford on his own memoirs." (PTX 22, R. Vol. IV, E 782). Mr. Navasky, in fact, distinguished between "reporting news" and "making news" referring to "our goal of not only reporting this event, but making news out of our report." (Navasky, TR, JA 296). Had he limited himself to "news reporting" he acknowledged he would not have needed to publish in advance of the authorized publication by the author. (Navasky, TR, JA 316f-316g, 416-17). But to make news, which was his objective, he had to publish early. (*Id.*). In so doing, he was arrogating to himself the author's right of first publication.

Finally, and most important, the majority did not consider that (1) the *Nation* used material from an unpublished manuscript, whose possession was known to be unauthorized, with no showing that its publication ahead of the author provided any benefit to the public, and (2) the *Nation* made a non-productive use, after rejecting a productive use that would have involved copying virtually no expression from the manuscript.

Each of these factors, in isolation, would provide an adequate justification for affirming the District Court. Considered together they provide a compelling case for affirmance.

In view of the foregoing, the *Nation*'s criticisms of the District Court's opinion on news reporting are irrelevant. (Br. in Opp. at 10-11). We should note, however, that the District Court did not err, as the *Nation* contends, by considering whether the news was "hot." The *Nation*'s principal contention in the trial court was that its use was fair because the news was hot. (*See, e.g.*, Navasky, TR, JA 280, 316-316h). The *Nation* should not be heard to complain that the judge conducted a trial on the contentions it advanced. In any event the conclusion of the District Court in this case was that the article was "not such news, 'hot' or otherwise, as to permit the use." (B 8) (emphasis supplied).

Nor did the District Court make a subjective evaluation of the journalism. The District Court in a footnote noted that "according to one of The Nation's own witnesses, a failure to check is poor journalism." (B 17). The District Court obviously did not consider this passing comment crucial to its decision. And the District Court's analysis of the "hotness" of the news simply referred to the objective fact that what the *Nation* believed was the news value of the piece at the time it published had in fact been extensively covered in the press. (B 7; Finding 45, C 25-26). It was not new in the journalistic sense, as Mr. Navasky himself conceded. (Navasky, TR, JA 348).

E. The Errors by the Majority Caused it to Reject Important Fair Use Determinations by the District Court

In evaluating the third and fourth fair use factors, the District Court found that the "Nation took what was essentially the heart of the book" and that the "Nation's extensive use of the Nixon pardon material caused the *Time* agreement to be aborted and thus diminished the value of the copyright." (B 8).

The majority rejected these findings because they were colored by the erroneous "totality" analysis. (A 28). In fact, however, as we have demonstrated the District Court applied the correct standard of copyrightability. Since no challenge was made to these findings, other than the erroneous claim that an

improper standard was applied, the findings should have been affirmed.

F. The Determination by the District Court That the Use Was Not Fair Should Have Been Affirmed

Given the undisputed facts of this case—the extensive use of expression from an unpublished manuscript, with no contribution by the user, with no benefit to society, and with an adverse economic impact on the copyright owner—the District Court's conclusion that the use was unfair should have been affirmed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court affirmed.

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